Supreme Court, U.S.
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No. 85-1512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Petitioners,

v.

DONALD F. BAKER,

Respondent.

ON CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION

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The questions presented by Hill's Cross-Petition for Writ of Certiorari are patently insufficient to warrant review by this Court. Moreover, Hill has expressly made submission of that cross-petition, as well as the cross-petition in No. 85-1412, contingent upon the granting of certiorari in either No. 85-1225 (Petition of Donald F. Baker) or 85-1251 (Petition of the State of Texas). Therefore, the Court need consider neither of Mr. Hill's cross-filings should it take the course suggested in Baker's Reply Brief in No. 85-1225, and summarily vacate the Fifth Circuit judgment, remanding with instructions to dis-

miss the appeal, on the authority of the Court's recent decision in *Bender* v. *Williamsport Area School District*, No. 84-773 (March 25, 1986).[1]

Should the Court instead decide to consider Hill's cross-filings, Petitioner Baker does wish to dispel any confusion which may arise therefrom with respect to Baker's standing to challenge Section 21.06. For Hill has invoked the wrong line of cases. In relying on *Steffel* v. *Thompson*, 415 U.S. 452 (1974), and *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), Hill has overlooked the fact that those cases involved statutes or government policies that applied with an even hand to *all* members of the public. "*Steffel* concerned a general trespass ordinance that did not, on its face, apply particularly to activities in which Steffel engaged or sought to engage." *Ellis* v. *Dyson*, 421 U.S. 426, 447 (1975) (Powell, J., dissenting). *Lyons* concerned a police choke-hold policy that was potentially implicated in *every* encounter between police and the public, not just in confrontations with the police in which Lyons alleged that he engaged, or was likely to engage in the future.

In vivid contrast, Section 21.06 targets the very conduct — homosexual sodomy (and, since 1974, *only* homosexual sodomy, *see* 24a, 77a) — in which it is undisputed that Baker has engaged and will continue to engage. As Hill seems to be aware, Petitioner Baker is a homosexual. And, far from denying that Section 21.06 *specifically targets* the intimate practices of homosexuals as such, Hill believes that to be the law's greatest virtue. *See, e.g.*, Cross-Petition in 85-1512 at 24-26.

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[1] Vacating the judgment below and requiring dismissal of Hill's appeal would, of course, reinstate the judgment of the district court without any opportunity for this Court to review either the district court's jurisdiction over the matter or its rulings on the merits. But that fact need not detain this Court any more here than it did in *Williamsport*, where the identical course of action reinstated a trial court judgment that this Court never reviewed.

This case is therefore governed by a different line of precedent. Justice Powell's dissenting opinion in *Ellis* v. *Dyson* is so directly apposite that it deserves quotation in full:

> In several cases we have found constitutional challenges to state and federal statutes justiciable despite the absence of actual threats of enforcement directed personally to the plaintiff. *E.g., Doe* v. *Bolton*, 410 U.S. 179, 188-89 (1973); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 506-08 (1972). *See CSC* v. *Letter Carriers*, 413 U.S. 548, 551-53 (1973). In each such case, . . . the challenged statute applied particularly and unambiguously to activities in which the plaintiff regularly engaged or sought to engage. In each case the plaintiff claimed that the State or Federal Government, by prohibiting such activities, had exceeded substantive constitutional limitations on the reach of its powers. . . . In such circumstances we have recognized that the challenged statute causes the plaintiff present harm, and that the "controversy is both immediate and real."

421 U.S. at 447. For example, physicians who wished to perform abortions were found to have standing to challenge a Georgia abortion law in *Doe* v. *Bolton* on the ground that the "physician is the one against whom these criminal statutes directly operate," 410 U.S. at 188, even though "the record does not disclose that any one of them has been prosecuted, or threatened with prosecution," *id.* Baker's standing is even clearer than that of the *Doe* physicians, for the district court

found that the threat of prosecution to Baker was "credible and real" (69a) — a finding upheld by the Fifth Circuit *en banc*.[2]

Quite apart from the impropriety of reversing that finding at this level without any basis in the record, there is a radical inconsistency between Hill's supposed "interest" in dissolving the injunction that bars him from enforcing Section 21.06 against Baker, and Hill's insistence that Baker is in no way threatened with prosecution under that law. At least in Potter County, it would appear that the threat to Don Baker is as real as District Attorney Hill can make it. When an agitated boxer clamors to have his hands untied and his gloves removed, it is hard to credit his simultaneous disclaimer that he is not going to hit anyone.

Nothing in the remainder of Hill's cross-petition merits extensive response. The original Fifth Circuit panel unanimously and correctly analyzed the fundamental issue of federalism underlying this case:

> Texas law . . . plainly designates the Attorney General as the official responsible for protecting the State's interest in litigation. . . . [And t]he Texas

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[2] Unlike the plaintiff in *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976), who alleged only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life, *see* Jurisdictional Statement in *Doe* v. *Commonwealth's Attorney*, No. 75-896 at 4, Baker has demonstrated a far more concrete harm. *See* Baker's Petition at 5 n.7. In particular, the defendants in the case at bar stipulated at trial that precisely the sort of violations of Section 21.06 in which Don Baker engages "'have been prosecuted by various assistant city attorneys and assistant district attorneys' in Dallas," and that defendants intend to continue to prosecute violations — *whether committed in public or in the privacy of one's home* — whenever they can prove such violations. (25a). Georgia's arrest and prosecution of Michael Hardwick for committing sodomy in his own bedroom, *see Bowers* v. *Hardwick*, No. 85-140 (argued March 31, 1986), demonstrate that no home is safe from police and prosecutors armed with a sodomy statute they are determined to enforce.

> Attorney General has decided that the sovereign interests of the State are served by foregoing an appeal in this case. It should be neither Hill's province nor ours to question that judgment.

(128a, 132a). Petitioner Baker *and more than half the States in the Union* emphatically concur in that conclusion.[3] Accordingly, Petitioner respectfully urges that a writ of certiorari be issued, that the judgment below be summarily vacated, and that this case be remanded with instructions to dismiss the appeal for want of jurisdiction.

Respectfully submitted,

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[3] *See amicus curiae* brief of the States of Alabama, Delaware, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming, filed in *State of Texas* v. *Hill*, No. 85-1251.